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No. 00-1534

In the Supreme Court of the United States

NEWELL RECYCLING COMPANY, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard of review in affirming the Environmental Protection Agency's (EPA's) determination that petitioner violated EPA regulations, promulgated pursuant to the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*, governing disposal of polychlorinated biphenyl (PCB) contaminated soil.

2. Whether petitioner's ongoing failure properly to dispose of PCB-contaminated soil was a continuing violation of EPA's PCB disposal regulations.

3. Whether petitioner was entitled to exclusion of evidence of petitioner's involvement in cleanup activities at the site.

4. Whether the civil penalty imposed on petitioner violates the Eighth Amendment's prohibition of excessive fines.

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OPINION BELOW

The opinion of the of the court of appeals is reported at 231 F.3d 204 (Pet. App. 1a-16a).

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2000. A petition for rehearing was denied on January 9, 2001 (Pet. App. 91a-92a). The petition for a writ of certiorari was filed on April 9, 2001. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States Environmental Protection Agency (EPA) administers the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.* TSCA, and the regulations promulgated thereunder, regulate the disposal of

polychlorinated biphenyls (PCBs). Disposal of PCBs in a manner inconsistent with those regulations is unlawful and subject to civil penalties. 15 U.S.C. 2614-2615. Petitioner Newell Recycling Company, Inc. (Newell) illegally disposed of 120 tons of PCB-contaminated soil in violation of TSCA, for which EPA imposed a civil penalty of $1.345 million. Petitioner sought review of EPA's final order in the United States Court of Appeals for the Fifth Circuit. See 15 U.S.C. 2615(a)(3). The court of appeals affirmed EPA's decision. Pet. App. 1a-16a.

1. Congress enacted TSCA to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, and disposal of certain chemical substances and mixtures. See 15 U.S.C. 2601 *et seq.* If EPA finds that any of those activities (or some combination) presents an unreasonable risk of injury to human health or the environment, TSCA authorizes EPA "to protect adequately against such risk using the least burdensome requirements." 15 U.S.C. 2605(a). In contrast to that general framework, Congress took the extraordinary step, in Section 6(e) of TSCA, of generally banning the manufacture, distribution, and use of PCBs. 15 U.S.C. 2605(e). Congress took that step because it recognized that PCBs pose extraordinary health risks.[1]

TSCA directs EPA to "prescribe methods for the disposal of [PCBs]." 15 U.S.C. 2605(e)(1)(A) and (2)(A). EPA has promulgated regulations pursuant to that

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[1] Prior to the enactment of TSCA, PCBs were used for more than sixty years, primarily in electrical equipment. PCBs are stable and resistant to fire and electrical current.

authority that are set forth at 40 C.F.R. 761.60.[2] Those regulations require that non-liquid PCBs in the form of soil at concentrations of 50 parts per million (ppm) or greater be disposed of in an incinerator complying with 40 C.F.R. 761.70 or a chemical waste landfill complying with 40 C.F.R. 761.75. 40 C.F.R. 761.60(a)(4)(i)-(ii). A violation of the disposal regulations carries a civil penalty of up to $25,000, and each day that the violation continues constitutes a separate violation. 15 U.S.C. 2615(a)(1).

2. From 1974 to 1982, petitioner owned a battery breaking and recycling facility in Houston, Texas. Petitioner sold the facility to Houston Metal Processing Company (HMPC) in 1982. In 1984, HMPC discovered lead contamination in the soil at the facility. In 1985, pursuant to the purchase agreement between petitioner and HMPC, petitioner undertook the removal of lead-contaminated soil. While excavating the lead-contaminated soil, petitioner's contractor uncovered numerous buried capacitors containing oil. Sampling by petitioner confirmed the presence of PCBs in the oil. In the process of removing the capacitors, petitioner excavated and stockpiled a large volume of PCB-contaminated soil and left the soil on site. See Pet. App. 2a-3a, 19a.

In 1992, an EPA inspection revealed that neither petitioner nor HMPC had properly disposed of the soil pile. In the interim, petitioner had obtained from its consultant extensive information about the volume of the PCB-contaminated soil, the level of PCB contamination, and the costs of cleanup. Petitioner also received demands from HMPC that petitioner remove and pro-

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[2] References to 40 C.F.R. Part 761 herein are to the 1995 edition.

perly dispose of the PCBs. Sampling by EPA during the 1992 inspection confirmed that the soil pile was contaminated with PCBs in excess of 50 ppm. Pet. App. 2a-3a, 19a, 21a-37a.

In response to a subpoena duces tecum, HMPC represented to EPA that the PCB-contaminated soil was still unaddressed. As a result, EPA initiated an administrative action by issuing a Complaint and Notice of Opportunity for Hearing pursuant to Section 16 of TSCA, 15 U.S.C. 2615, alleging that petitioner and HMPC had improperly disposed of PCBs in violation of 40 C.F.R. 761.60(a)(4) and Section 15(1)(C) of TSCA, 15 U.S.C. 2614(1)(C). See Pet. App. 23a-37a.

3. EPA's administrative complaint proposed a civil penalty of $1.345 million for violations of Section 15 of TSCA. HMPC entered into a settlement with EPA. EPA and petitioner conducted prehearing information exchanges pursuant to 40 C.F.R. 22.19,[3] whereby each disclosed the evidence upon which it intended to rely. Following the prehearing exchanges, on EPA's motion for accelerated decision (the administrative equivalent of summary judgment), the administrative law judge (ALJ) determined that there was no genuine issue of material fact regarding petitioner's liability and entered an accelerated decision holding petitioner liable for a continuing violation of 40 C.F.R. 761.60(a)(4).[4] On

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[3] References to 40 C.F.R. Part 22 are to the 1999 edition. Since the filing of EPA's complaint here, the consolidated rules of practice have been amended, effective August 23, 1999. See 64 Fed. Reg. 40,138 (1999).

[4] Pursuant to 40 C.F.R. 22.20(a), an ALJ may at any time render an accelerated decision in favor of a party without a hearing if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. Thus, a motion for accelerated decision is akin to a motion for summary judgment under the Federal

EPA's motion for assessment of civil penalty, the ALJ imposed a civil penalty of $1.345 million, less the amount paid by HMPC to settle its liability. Petitioner appealed to EPA's Environmental Appeals Board (EAB), which affirmed the decision of the ALJ on September 13, 1999.[5] See Pet. App. 3a, 37a-39a, 90a.

Petitioner petitioned the court of appeals for review of the EAB's decision, see 15 U.S.C. 2615(a)(3), and the court affirmed that decision in its entirety. Pet. App. 4a-16a. The court upheld the EAB's conclusions that the violations by petitioner were continuing in nature, and, therefore, EPA's action was not barred by the statute of limitations. *Id.* at 4a-6a. The court also upheld the EAB's determination that the creation of the soil pile was a disposal of PCBs, that petitioner caused or contributed to the disposal, and that petitioner was therefore liable for the violations. *Id.* at 6a-9a. The court affirmed EPA's penalty calculation methodology and further held that the penalty, which was 10% of the statutory maximum, did not violate the Eighth Amendment's prohibition on excessive fines. *Id.* at 14a-15a. Finally, the court of appeals held that petitioner was afforded due process in the EPA proceedings. *Id.* at 15a.

ARGUMENT

The court of appeals correctly rejected petitioner's challenge to the EPA's assessment of civil penalties for petitioner's improper disposal of PCB-contaminated

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Rules of Civil Procedure. See *ALM Corp.* v. *EPA*, 974 F.2d 380, 382 n.2 (3d Cir. 1992), cert. denied, 507 U.S. 972 (1993).

[5] The EAB is a permanent body consisting of three administrative judges who act as the final agency decision-maker over administrative appeals under a variety of EPA-administered statutes. 40 C.F.R. 1.25(e)(1) (1999).

soil. The court's decision does not conflict with any decision of this Court or another court of appeals and does not present any issue otherwise warranting this Court's review.

1. Petitioner contends (Pet. 8-10) that the court of appeals erred in applying the Administrative Procedure Act's (APA's) standard of review in assessing EPA's administrative decision. That contention is without merit. As the court of appeals correctly recognized, the APA explicitly directs a reviewing court to hold unlawful and set aside agency action, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). See Pet. App. 4a; *e.g.*, *Amoco Prod. Co.* v. *Lujan*, 877 F.2d 1243, 1248 (5th Cir.), cert. denied, 493 U.S. 1002 (1989). Petitioner acknowledges (Pet. 9) that it cannot cite any law requiring courts to apply a different standard. The court of appeals' application of the APA standard does not present "a matter of first impression" (Pet. 8), but is instead a matter of settled law.[6]

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[6] Petitioner also asserts in passing that it was entitled to an evidentiary hearing before the ALJ. See Pet. 19-20. EPA's regulations governing its adjudications allow an accelerated decision where there is no genuine issue of material fact. 40 C.F.R. 22.20. The ALJ, upon reviewing the record and the briefs of the parties, determined that petitioner raised no genuine issue of material fact, and thus an accelerated decision was appropriate. Both the EAB and the court of appeals, upon reviewing the record, agreed that petitioner failed to place a material fact in genuine dispute. Pet. App. 15a, 21a. Having failed to meet that threshold, petitioner errs in asserting that a hearing was required. *Costle* v. *Pacific Legal Found.*, 445 U.S. 198, 213 (1980). Moreover, this fact-specific claim does not present the kind of issue that would warrant review by this Court.

2. Petitioner contends (Pet. 12-17) that the court erred in holding that petitioner's actions—excavating PCB-contaminated soil and stockpiling it on-site in violation of EPA's disposal requirements, 40 C.F.R. 761.60(a)—constituted a "continuing" violation of EPA's regulations. See Pet. App. 5a-6a. The court's decision is correct. TSCA provides that violations carry a "civil penalty in an amount not to exceed $25,000 for each such violation" and that "[e]ach day such a violation continues shall * * * constitute a separate violation of section 2614." 15 U.S.C. 2615(a)(1). That language expressly recognizes that a course of conduct that presents a continuing threat, such as a failure properly to dispose of PCBs, may be subject to cumulative penalties as a continuing violation.

EPA's PCB disposal regulations properly implement the statutory language. The disposal requirement set forth in 40 C.F.R. 761.60(a)(4) "contains elements of both obligation and prohibition," requiring explicitly that disposal "shall" occur only in one of two specified ways. Pet. App. 46a (emphasis omitted). The disposal obligation "is discharged only with the occurrence of a specified event—the proper disposal of PCB-contaminated soil at an incinerator or a chemical waste landfill." *Ibid.* Until that occurs, therefore, the responsible party has not complied with the regulatory mandate and the responsible party commits, each day, a new violation of Section 761.60(a)(4). Pet. App. 46a.

EPA's interpretation of 40 C.F.R. 761.60(a)(4) is consistent with TSCA's remedial goals. Congress expressed particular concern over the nature and risks posed by use and improper disposal of PCBs. 15 U.S.C. 2605(e)(2) and (3). Congress directed EPA to prescribe methods for the disposal of PCBs, which are to be con-

sistent with the requirements relating to the ban on PCBs. 15 U.S.C. 2605(e)(1)(A). Those provisions demonstrate a congressional objective to eliminate PCBs from the environment through strong incentives for proper disposal—an objective that would be thwarted if the ongoing abandonment of PCB-contaminated soil, in the face of a continuing threat to public health and the environment, were viewed as a one-day violation of TSCA's requirements.

Petitioner is therefore wrong in suggesting (Pet. 16) that a policy of repose supports its construction of TSCA's penalty provisions. As this Court has recognized, a policy of repose is "frequently outweighed * * * where the interests of justice require vindication of the plaintiff's rights." *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 428 (1965). See also *E.I. DuPont De Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924) (statutes of limitations sought to be applied to bar rights of the government must receive strict construction in favor of the government). Finding that petitioner's violations were continuing, and therefore not barred by the statute of limitations, is neither unfair nor harsh. Petitioner is not entitled to repose where its knowing failure properly to dispose of the PCB-contaminated soil created and perpetuated the ongoing risk that TSCA was designed to prevent.

Petitioner is mistaken in suggesting (Pet. 13) that there is a conflict among the courts of appeals concerning what constitutes a continuing violation of TSCA's PCB disposal requirements. The court of appeals' ruling in this case is the only appellate decision addressing that question. Petitioner simply lists (Pet. 13-15) various cases involving regulatory infractions that were decided under different statutes, such as the Clean Water Act, and that involved readily distinguishable

factual situations, such as discrete discharges of pollutants. See, *e.g.*, *Connecticut Coastal Fisherman's Ass'n* v. *Remington Arms Co.*, 989 F.2d 1305, 1311-1313 (2d Cir. 1993) (rejecting a citizen suit alleging that a gun club that ceased operation is nevertheless in continuing violation of Clean Water Act's pollutant discharge prohibitions). None of those cases presents a situation comparable to petitioner's continuing disregard of its obligation properly to dispose of PCBs.[7]

3. Petitioner contends (Pet. 17-19) that the court of appeals improperly allowed EPA to consider evidence of petitioner's eventual cleanup of the site as evidence of "subsequent remedial measures" that should have been excluded under the public policy that animates Federal Rule of Evidence 407. As petitioner concedes, Rule 407 does not apply to EPA's administrative proceedings. But even if Rule 407 applied and petitioner's actions could be considered "subsequent remedial measures," Rule 407 would not have precluded admission of the evidence at issue, which was considered for purposes other than to prove "culpable conduct." Fed. R. Evid. 407. See *ibid.* ("This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, * * * or impeachment.").

The EAB and the court of appeals properly considered evidence of petitioner's eventual cleanup of the PCB-contaminated soil in connection with petitioner's contention that other entities conducted activities at the site without petitioner's involvement. The EAB and the court of appeals made reference to petitioner's

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[7] Petitioner is also mistaken in suggesting that there is a conflict among EAB decisions. See Pet. App. 42a-50a (describing the EAB's prior decisions and analysis).

eventual cleanup in concluding that, contrary to petitioner's contention, "the actual physical undertaking of the removal work was performed pursuant to [petitioner's] direction and control." Pet. App. 57a; accord *id.* at 7a. Petitioner invokes Rule 407's underlying policy of encouraging personal injury defendants to undertake voluntary "remedial measures" to prevent future injury. But petitioner did nothing of that kind. Rather, petitioner simply responded, belatedly, to its ongoing legal obligation to dispose of the PCB-contaminated soil. Even if petitioner's characterization of its actions were accurate, petitioner's fact-based objection to the consideration of particular evidence would not present an issue of general importance warranting this Court's review.

4. Petitioner contends (Pet. 10-12) that the court of appeals erred in ruling that the penalty imposed by EPA does not violate the Eighth Amendment's prohibition on excessive fines. See U.S. Const. Amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Petitioner's contention is without merit.

This Court has ruled that a criminal penalty is "excessive" under the Eighth Amendment only if it is "grossly disproportional" to the offense. *United States* v. *Bajakajian*, 524 U.S. 321, 336-337 (1998). The Court has emphasized that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature" and that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.* at 336. "Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense." *Ibid.*

Contrary to petitioner's contentions, the application of *Bajakajian* here compels the conclusion that petitioner's civil penalty is not excessive. TSCA, like other federal environmental statutes, authorizes a civil penalty of up to $25,000 per day of violation. 15 U.S.C. 2615(a). See, *e.g.*, Clean Water Act, 33 U.S.C. 1319(d); Solid Waste Disposal Act, 42 U.S.C. 6928(g), 6991e; Clean Air Act, 42 U.S.C. 7413(b). See also 28 U.S.C. 2461 note (referencing legislation providing for upward inflation adjustments to those penalties). Congress's judgment to set civil penalties at that level, which has been in place for many years, is unquestionably reasonable. As the court of appeals correctly noted, the penalty actually assessed is only 10% of the amount Congress authorized in TSCA and similar statutes. Pet. App. 14a.[8]

EPA carefully considered and weighed the relevant factors, including objective criteria set out in TSCA and EPA's penalty policy, in determining the amount of the penalty. See Pet. App. 10a-13a, 59a-89a. The amount of the penalty is reasonable in light of petitioner's actions in illegally disposing of a substantial amount of PCB-contaminated soil, abandoning the soil pile for a period of ten years, and ignoring the urgings of HMPC and its

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[8] Additionally, EPA assessed a penalty for only a fraction of the time period that petitioner was in violation of TSCA. As the EAB noted, for penalty calculation purposes, EPA established February 21, 1994, as the cut-off date of Newell's violation, despite the fact that the PCB-contaminated soil was not removed and properly disposed of until over a year and a half later. Pet. App. 89a n.31. Furthermore, EPA did not count the seven-year period of violation from the time the PCB-contaminated soil was stockpiled in 1985 until 1992. EPA thus substantially mitigated petitioner's penalty, at the outset of the case, through the exercise of its enforcement discretion.

own consultant to comply with the law. The magnitude of the civil penalty, which is only a fraction of the statutory maximum, provides no basis for an extended comparative analysis. See generally *Harmelin* v. *Michigan*, 501 U.S. 957 (1991). Even if such an analysis revealed that similarly situated parties received lower penalties than petitioner, the penalty would not necessarily be invalid. As the EAB noted, "penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another." Pet. App. 88a-89a. See *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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